FUNG SUI JIN

v.

BORNEO HOUSING MORTGAGE FINANCE BHD & ORS

HIGH COURT SABAH & SARAWAK, TAWAU
RICHARD MALANJUM J
[ORIGINATING SUMMONS NO: T24-06 OF 1999]
14 JUNE 2000

LAND LAW: *Charge - Discharge of - Land charged to bank for bridging finance - Whether purchaser of sub-divided lot could set aside charges - Whether purchaser had prior claim - Concept of bare trustee - Equitable principles*

The plaintiff purchased a single-storey terrace house ('the property') from the 2nd respondent housing developer. At the time of purchase, the property did not have a title deed. There was only a parent title deed in respect of the land thereunder of which the 2nd respondent was the registered owner. Because of that no memorandum of transfer was executed in respect of the property. Nevertheless, the plaintiff went into occupation of the property as soon as she was able to do so. Meanwhile, the 2nd respondent charged the land to the 1st defendant for bridging finance.

When the 2nd defendant defaulted in the repayment of the bridging finance and went into receivership, the 1st defendant commenced an action to sell the land by way of public auction. That led to the plaintiff's present application to set aside the charges against the land and to declare them null and void. The issues were: (i) whether the 2nd defendant was a bare trustee for the plaintiff when the charges were created; and (ii) whether equitable principles should apply in view of the prior knowledge of the 1st defendant of the plaintiff's interest in the property.

Held:

[1] For the concept of bare trustee to arise, two elements must be present. The evidence of full payment of the purchase price by the plaintiff was only one element of the concept of bare trustee. With the absence of a memorandum of transfer, the other element of the concept was not satisfied. Hence, the concept of bare trustee did not arise. At best, the relationship of the plaintiff and the 2nd respondent was only contractual in nature.

[2] The plaintiff referred to an offer of a loan made by the 1st defendant to the plaintiff as evidence of the defendant's knowledge of the plaintiff's interest in the property. However, the documents related to the offer of loan referred the property as No. 10 whereas the property herein was No. 27. That was not clarified by the plaintiff. Therefore, it could not be accepted as evidence of imputing knowledge on the part of the 1st defendant.

[3] The mere knowledge that the 1st defendant knew of the purchase of the property by the plaintiff did not amount to fraud.

[4] There was no evidence to the plaintiff's allegation on the use of a common firm of solicitors that had handled the sale of the property and the charges in question. The principle as regards knowledge of a solicitor to be imputed upon the client was quite narrow. It speaks of a solicitor and not a firm of solicitors. Accordingly, the plaintiff could not rely on the principle of knowledge of a solicitor to be imputed upon the client and there was no reason to invoke the equitable principles.

[Application dismissed; costs awarded to 1st defendant.]

Case(s) referred to:

Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Appeal [1995] 3 CLJ 639 ***(refd)***

Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd. [1996] 2 CLJ 561 ***(foll)***

Co-operative Central Bank Ltd (In receivership) v. Feyen Development Sdn Bhd [1995] 4 CLJ 300 ***(refd)***

Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors [1998] 1 CLJ 793 ***(refd)***

Southern Estate Sdn Bhd & Anor v. Tractors Malaysia Bhd [1996] 4 CLJ 344 ***(refd)***

Wu Shu Chen (Sole executrix of the estate of Goh Keng How, deceased) & Anor v. Raja Zainal Abidin bin Raja Hussin [1997] 3 CLJ 854 ***(refd)***

For the plaintiff - Liew Chiew Chai; M/s CC Liew & Co

For the 1st defendant - John Lee Tsun Vui; M/s Vincent Wong & Co

For the 2nd & 3rd defendants - Jolita Ijom, Official Receiver Jabatan Pemegang Harta

For the 4th defendant - Mohd Amin Tenreng, Jabatan Peguam Besar Negeri

Reported by Suhainah Wahiduddin

JUDGMENT

Richard Malanjum J:

By way of an originating summons dated 8 February 1999 (encl. 1) the plaintiff is applying for the following orders, namely:

(a) For an Order that the Memoranda of Charge under Memorial Nos. 30195392, 30195391 and 30195393 registered against the title deed numbered CL 105474879 (Parent Title No. CL 105344787) be set aside;

(b) For an Order of Declaration that the Memoranda of Charge under Memorial Nos. 30195392, 30195391 and 30195393 are null and void against the title deed number CL 105474879 (Parent Title Deed No. CL 105344787);

(c) For an order that the charge under Memorial Nos. 30195392, 30195391 and 30195393 be vacated from the original and the issue copy of the title deed numbered CL 105474879 (Parent Title Deed No. CL 105344787);

(d) For an Order that the Registrar of Land Titles do vacate the charge under Memorial Nos. 30195392, 30195391 and 30195393 from the Register of Charge;

(e) For an Order that the costs of this application be borne by the 1st Defendant; and

(f) Such other reliefs as this Honourable Court may deem fit.

This application is supported by (i) the affidavit in support affirmed by Fung Sui Jin on 8 February 1999 (encl. 2) (Fung's 1st affidavit); (ii) the affidavit in reply affirmed by Liew Chiew Chai on 23 March 1999 (encl. 5) (Liew's 1st affidavit); (iii) the supplementary affidavit in support affirmed by Liew Chiew Chai on 8 July 1999 (encl. 9) (Liew's 2nd affidavit); and (iv) the supplementary affidavit of Datuk Hiew Min Yong affirmed in September 1999 (encl. 12) (Hiew's 1st affidavit).

And although there are four defendants cited only the 1st defendant filed affidavits opposing the application through Mr. Lim Fong Mee, its chief executive officer. The affidavits are:

(a) the affidavit in reply affirmed by Lim Fong Mee on 23 February 1999 (encl. 3) (Lim's 1st affidavit); and

(b) the further affidavit in reply affirmed by Lim Fong Mee on 11 August 1999 (encl. 10) (Lim's 2nd affidavit).

a There is hardly any dispute on the facts in this case. Briefly the plaintiff alleges that on 19 August 1982 by way of a sale and purchase agreement (FSJ1) she purchased from a developer Hiew Fook Realty (Holdings) Sdn. Bhd. (HFR) one unit of single-storey terrace house known as No. 27C Taman King Fook, KM 3.5 North Road 91000 Tawau, Sabah, Malaysia (the said property).
b At the time of the purchase the said property did not have its own title deed. There was only a parent title deed under CL105344785 (the said land) of which HFR was the registered owner. The said property has now a subdivided title deed No. CL105474879.

At the time of purchase the price of the said property was RM79,900. The
c plaintiff alleged that she had paid the full purchase price by way of five instalments of which the last payment was on 26 September 1983. Copies of the receipts were produced (FSJ-2 (a)-(e) in encl. 2). However, there is no denial that only one receipt was issued by HFR and the other four were issued by HFR Development Sdn. Bhd. (HFR development).

d It was admitted by the plaintiff that there was no memorandum of transfer executed in respect of the said property as there was then no subdivided title deed. Nevertheless she said that she went into occupation of the said property as soon as she was able to do so.

e Meanwhile, HFR charged the said land to the 1st defendant by way of three registered charges under Memorial Nos. 30195391, 30195392 and 30195393 all registered on 15 February 1986 (the charges) for bridging finance. However, the charges were subject to existing charges with Standard Chartered Bank registered between 10 December 1979 and 24 July 1985. But it is only the
f charges that the plaintiff is questioning in this application while contending that there was an arrangement reached between the 2nd defendant and Standard Chartered Bank in that not all parcels of the said land were subject to the charges of the latter.

Now this present application came about when the 2nd defendant defaulted
g in the repayment of the bridging finance and in fact went into receivership. Meanwhile, the 1st defendant commenced an action to sell the said land by way of public auction thus prompting the plaintiff to make this application.

The thrusts of the contentions of the plaintiff are as follows:

h (i) that she has a prior claim to the said property by virtue of the purchase being made earlier than the charges and at the time of the creation of the charges the 2nd defendant was thus a bare trustee for the plaintiff; and

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(ii) that the 1st defendant had knowledge of the interest of the plaintiff in the said property due to the common legal firm of solicitors that handled the sale to the plaintiff and the charges and that the 1st defendant in fact made an offer of a loan to the plaintiff.

For the 1st defendant it was contended that the plaintiff failed to pay in full the purchase price to the 2nd defendant and that there was no valid memorandum of transfer executed in favour of the plaintiff. It was also argued that the plaintiff had not proved fraud.

Having perused the materials before me and after considering the respective contentions of learned counsel for the parties, I am of the view that the main issue to consider is whether the 2nd defendant was a bare trustee for the Plaintiff when the charges were created. The secondary issue is whether equitable principles should apply in this case in view of the prior knowledge of the 1st defendant on the interest of the plaintiff in the said property.

In respect of the first issue, it is very much on whether this case should be distinguished from the case of *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd.* [1996] 2 CLJ 561 FC. And in order to facilitate such an exercise it is appropriate to note the facts of that case.

Briefly, in *Time Engineering*'s case *(supra)* the developer, United Lands Development Sdn. Bhd. applied for a bridging loan from the appellant, Borneo Housing Mortgage Finance Bhd. in March 1982 to finance the industrial development project on four pieces of land in Sabah. And on 2nd November 1982 the developer entered into a sale and purchase agreement with the respondent to purchase an industrial building to be built on those pieces of land. Then on 28 May 1983 the developer created a charge over those lands and duly registered under the Sabah Land Ordinance in favour of the appellant. As of 23 May 1986 the respondent had paid in full the purchase price of the property it had bought. Meanwhile, the developer failed to meet the repayment of the bridging loan and thus the appellant commenced an action to enforce the charge. On 17 August 1991 an order for sale was made and on 30 November 1991 the property was sold to Karamunsing Jaya Sdn Bhd. The certificate of sale dated 26 February 1992 was thus issued. On 7 December 1991 the respondent commenced an action seeking several orders. At the hearing before the court of the first instance the respondent was successful in that the court held that the developer had become a bare trustee upon the purchase price being paid in full and that it operated retrospectively from the execution of the sale and purchase agreement. The appellant appealed to the Federal Court.

In delivering judgment for the court his Lordship Edgar Joseph Jr FCJ said this at p. 26:

In our view, the correct approach to adopt in considering the priority dispute in this appeal is to apply general law priority rules, not forgetting s 88 of the Land Ordinance and the concept of the bare trust doctrine in a vendor/purchaser situation.

And further down at p. 28 his Lordship went on to say this:

In our view, therefore, it is too late now to question the applicability of the concept of the bare trust in a vendor/purchaser situation in Malaysia, though there is high authority to show that the concept, as enunciated by Jessel MR in *Lysaght v. Edwards*, would require to be applied in a modified form, so far as the question when the bare trust will arise is concerned, and it is to this question that we must now direct attention.

The question when the vendor of land becomes a bare trustee for the purchaser in Malaysia has not been uniformly answered by the old Federal Court, in the days when our apex court was the Judicial Committee of the Privy Council and this is reflected in a number of its decisions, to some of which we should now like to refer.

In *Peninsular Land Development Sdn Bhd v. K Ahmad* [1970] 1 MLJ 149, Suffian FJ (as he then was) said (at p 151):

> In my judgment, the company [the vendor] becomes in equity a trustee for the plaintiff [the purchaser] and the beneficial ownership passes to the plaintiff as soon as the purchase price has been paid.

In *Temenggong Securities Ltd & Anor v. Registrar of Titles, Johore & Ors* [1974] 2 MLJ 45, Ong Hock Sim FJ said (at p. 47):

> The law is clear that the vendors, after receipt of the full purchase price and surrender of possession of the lands to the appellants [the purchasers] are bare trustees for the appellants of the said land...

This view was not dissented from by the Privy Council when their Lordships dealt with the matter on appeal (see [1976] 2 MLJ 44).

But, in the earlier case of *Ong Chat Pang & Anor v. Valiappa Chettiar* [1971] 1 MLJ 224, Gill FJ took a somewhat different view when he said (at p. 229):

> … the point at which the vendor becomes constructively a trustee for the purchaser is reached only when he has done **all t**hat is necessary to divest himself of the legal estate by executing a valid transfer of the land in favour of the purchaser. [Emphasis provided.]

Judith Sihombing in her book *National Land Code: A Commentary* (2nd Ed, 1992) at p 801 says that the proprietor has done all that is necessary when he has given the donee a transfer in registrable form and the issue document of title.

In *Karuppiah Chettiar v. Subramaniam* [1971] 2 MLJ 116, it was held (at p 119) that a vendor is regarded as having divested himself of all the beneficial interest in his land and vested it in the purchaser only at the time when the memorandum of transfer is executed and the purchase money is paid in full.

Thereafter his Lordship came to a clear conclusion at p. 29-30 thus:

In our view, the contractual events which result in the vendor becoming a bare trustee of the land, the subject matter of the agreement of sale and purchase, for the purchaser, is on completion, that is to say, upon receipt by the vendor of the full purchase price, timeously paid and when the vendor has given the purchaser a duly executed, valid and registrable transfer of the land in due form in favour of the purchaser, for it is then that the vendor divests himself of his interest in the land.

In our view, it is not a correct description of the relationship between the parties to a contract of sale and purchase of land to say, as did the High Court at Shah Alam in Ahmad bin Salleh, that from the time a contract of sale and purchase of land is concluded, the vendor is a trustee for the purchaser. **At that stage, they are only parties to a contract of sale and purchase of which a court may, in certain circumstances, decree specific performance**.

We cannot, however, give unqualified approval to the view of Prof Visu Sinnadurai, found at p 219 of his well-regarded book on Sale and Purchase of Real Property in Malaysia – which, it will be recalled, was the 'sheet anchor' of the judgment of the court below – that 'on the date of completion, if the vendor becomes a bare trustee, it operates retrospectively by conversion to the date when the contract was made' as this proposition, if applied universally, could cause considerable difficulties in the workings of the Torrens system of registration of title or even a modified Torrens system of land registration – as in Sabah – contained in a codifying enactment. Take this very case, where between the execution of the sale and purchase agreement and completion, the interest of the finance company chargee had intervened in the circumstances mentioned, so that to transfer into the law of vendor and purchaser, the law governing the rights and duties of trustees, statutory or otherwise, would give rise to considerable difficulties (per Jacobs J in *Chang & Anor v. Registrar of Titles* [1976] 8 ALR 285 at p 295).

A further factor which complicates the matter here is the position of the purchaser at the judicial sale, in whose favour a certificate of sale dated 26 February 1992 had been issued prior to the pronouncement of judgment on 25 April 1994, in the proceedings by way of originating summons by the purchaser under the agreement, which had been overlooked all round and to which we shall have to revert.

> Given these circumstances, no court would grant specific performance of the sale and purchase agreement aforesaid. The trustee/beneficiary relationship will not be applied in a vendor and purchaser situation where the contract of sale and purchase is not one of which a court would grant specific performance. (emphasis added).

Learned counsel for the plaintiff argued that the principle enunciated in *Time Engineering*'s case *(supra)* should not be applied to the present case since in that case there were special features, namely, at the time of the creation of the charge the purchase price had not been paid in full and that by the time the respondent commenced its action the property had already been sold to a purchaser in a public auction. It was then submitted that upon these special features the preposition of the court in respect of the elements of bare trustee should be held a mere *obiter dictum*.

Learned counsel also said that there were earlier cases which dealt with the concept of bare trustee as well but were not overruled by *Time Engineering*'s case *(supra)*. In short, learned counsel urged this court that those cases should be followed in considering the present case.

With respect I cannot agree that the pronouncement of the principle of bare trustee in *Time Engineering*' case *(supra)* should be construed as a mere obiter. Indeed his Lordship was reviewing the state of the law on the concept of bare trustee and after considering the relevant cases he came to a conclusion that the true position of the law as regards the concept should be as he stated.

As for the argument that there were special features in that case I am of the view that such an approach is tantamount to hair-splitting. The important point is that for the concept of bare trustee to arise the two elements must be present, namely, that "upon receipt by the vendor of the full purchase price, timeously paid and when the vendor has given the purchaser a duly executed, valid and registrable transfer of the land in due form in favour of the purchaser, for it is then that the vendor divests himself of his interest in the land."

In the instant case there was a question of whether the purchase price was ever received by HFR. But I would say that with the 1st affidavit of Hiew that went unrebutted by the 1st defendant there was evidence of full payment of the purchase price by the plaintiff. Unfortunately, that is only one element of the concept of bare trustee. Meanwhile, there is a clear admission on the part of the plaintiff that there was no memorandum of transfer executed at any time on or even after the purchase price had been paid let alone a valid and registrable one. With such absence the other element of the concept has not been satisfied and hence it does not arise in this case. At best therefore the relationship of the plaintiff and HFR was only contractual in nature.

It is therefore my conclusion that although at the time when the charges were created the plaintiff had paid in full the purchase price for the said property HFR could not be described as a bare trustee for her as the second element of the concept was absent. In coming to this conclusion I am aware that it may appear unjust to the plaintiff. But I am bound by the present state of the law. Indeed his Lordship Edgar Joseph Jr in the case of *Co-operative Central Bank Ltd (In receivership) v. Feyen Development Sdn Bhd* [1995] 4 CLJ 300 at p. 314 said this:

> However, we repeat, this is not a court of morals but a court of law and, if the counsel for the chargor company is correct in his contentions, he is entitled to succeed.

I am conscious of the fact that the decision of the Court of Appeal in the case of *Wu Shu Chen (Sole executrix of the estate of Goh Keng How, deceased) & Anor v Raja Zainal Abidin bin Raja Hussin* [1997] 3 CLJ 854 did make reference to cases in which the principle therein was not preferred in *Time Engineering*'s case *(supra)*. But on close scrutiny of the judgment in *Time Engineering*'s case with respect I am of the view that it represents the current position of the law as opposed to what has been stated in those earlier cases.

I now come to the issue of equitable principles.

Basically, it is the stand of learned counsel for the plaintiff that it would be unconscionable to allow the 1st defendant to enforce the charges since the plaintiff had paid in full the purchase price and at the time of the creation of the charges the 1st defendant knew of the interest of the plaintiff in the said property.

In respect of knowledge learned counsel cited the fact that a common firm of solicitors was used in the transactions between the plaintiff and HFR and that of between the 2nd defendant (HFR) and the 1st defendant. There was also a reference to an offer of a loan made by the 1st defendant to the plaintiff.

I had examined the documents relating to the offer of loan to the plaintiff by the 1st defendant and I noted that the property mentioned therein was No. 10 of Taman King Fook, Phase 1 whereas the said property is No. 27C. Moreover, the timing seems to be odd in that the offer was made before the purchase of the said property. And although the subsequent letter from the 1st defendant was issued in 1983 it continued to refer to No. 10 and not No. 27C. There was no clarification on this point by the plaintiff. I would therefore hesitate to accept that aspect of the evidence as imputing knowledge on the part of the 1st defendant.

In any event, assuming that indeed the 1st defendant knew of the purchase of the said property by the plaintiff such mere knowledge does not amount to fraud. (See: *Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors* [1998] 1 CLJ 793). And even if fraud has been pleaded by the plaintiff, which I doubt in this case, I am not satisfied that it has been proved beyond reasonable doubt as required by law. (See: *Southern Estate Sdn Bhd & Anor v. Tractors Malaysia Bhd* [1996] 4 CLJ 344).

In respect of the allegation on the use of a common firm of solicitors, I would say that two different solicitors attested the signatures in the respective transactions. Now, from the documents, namely, the sale and purchase agreement executed between HFR and the plaintiff the solicitor attesting thereof was one Mr. Ting E Hang whilst the solicitor involved in the charges documents between HFR and the 1st defendant was one Mr. Paul Kan. These solicitors may or may not be from the same firm at the material time. There was no evidence to that effect save for the assertion of the plaintiff in her first supporting affidavit. At any rate the principle as regards knowledge of a solicitor to be imputed upon the client in my view is quite narrow. It speaks of a solicitor and not a firm of solicitors. In the case of *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Appeal* [1995] 3 CLJ 639 this is what his Lordship Gopal Sri Ram JCA said at p. 680:

> The second proposition which I accept as well settled is that the knowledge of a solicitor is regarded by the law as the knowledge of the client. The only exception to this is where the solicitor acts fraudulently vis-a-vis his client.

Accordingly, I do not think the plaintiff can now rely on the principle of knowledge of a solicitor to be imputed upon the client.

Accordingly, I have no reason to invoke the equitable principles as urged by learned counsel for the plaintiff.

In the upshot, this application therefore fails and I dismiss it with costs to be taxed unless agreed. However, since the main dispute was only between the plaintiff and the 1st defendant I would award costs only to the 1st defendant.